

DECISION ON THE MERITS

Adoption: 17 May 2016

Notification: 6 June 2016

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Bedriftsforbundet v. Norway

Complaint No. 103/2013

The European Committee of Social Rights, committee of independent experts (“the Committee”) established under Article 25 of the European Social Charter, during its 285th session attended by:

Giuseppe PALMISANO, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK, General Rapporteur
Colm O’CINNEIDE
Brigitta NYSTRÖM
Karin LUKAS
Eliane CHEMLA
József HAJDU
Marcin WUJCZYK
Krassimira SREDKOVA
Raul CANOSA USERA
François VANDAMME

Assisted by Régis BRILLAT, Executive Secretary

Having deliberated on 17 May 2016,

On the basis of the report presented by Lauri LEPPIK ,

Delivers the following decision, adopted on this date:

PROCEDURE

1. The complaint submitted by *Bedriftsforbundet* was registered on 9 September 2013. It was notified communicated to the Government of Norway (“the Government”) on 24 September 2013.
2. *Bedriftsforbundet* alleges a violation of Article 5 of the Revised European Social Charter (“the Charter”) on the grounds that closed shop practices exist in the dock sector.
3. In accordance with Rule 29§1 of the Rules of the Committee (“the Rules”), on 22 September 2013, the President of the Committee asked the Government to make, before 7 November 2013, written observations on admissibility of the complaint.
4. The Government’s observations on admissibility were registered on 7 November 2013. Additional observations on admissibility were submitted on 7 May 2014.
5. Additional observations by *Bedriftsforbundet* were registered on 14, 25 and 29 November 2013 and on 10 February and 20 May 2014.
6. On 14 May 2014 the Committee declared the complaint admissible. On 20 May 2014 the admissibility decision was notified to the parties and the Government was simultaneously invited to make written submissions on the merits of the complaint by the time limit of 15 July 2014.
7. On 20 May 2014, referring to Article 7§1 of the Protocol providing for a system of collective complaints (“the Protocol”), the Committee invited the States Parties to the Protocol, and the States having submitted a declaration pursuant to Article D§2 of the Charter, to transmit to it any comments they might wish to make on the merits of the complaint by 15 July 2014.
8. No such observations were received.
9. Pursuant to Article 7§2 of the Protocol, the Committee invited the international employers’ and workers’ organisations mentioned in Article 27§2 of the 1961 Charter to submit observations before 15 July 2014.
10. Observations by the European Trade Union Confederation (“ETUC”) were registered on 15 July 2014.
11. The Government’s submissions on the merits were registered on 15 July 2014.

12. The deadline set for *Bedriftsforbundet's* response to the Government's submissions on the merits was 23 October 2014. The response was registered on 14 August 2014. Additional submissions from *Bedriftsforbundet's* were registered on 29 August and on 23 September 2014, on 5 February and on 7 September 2015.

13. Additional observations on the merits by the Government were registered on 16 and 24 September 2014 and on 29 September 2015.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

14. *Bedriftsforbundet* invites the Committee to find a violation of Article 5 of the Charter on the grounds that there is a consistent and long term practice at Norwegian ports requiring that employees are members of the dock workers union, the Norwegian Transport Workers Union (NTF) in order to be recruited and to be continued to be employed.

B – The respondent Government

15. The Government rejects the complainant organisation's allegations in their entirety and asks the Committee to declare the complaint unfounded in all respects.

THIRD PARTY INTERVENTION

The European Trade Union Confederation (ETUC)

16. The ETUC in its observations (see paragraphs 60-75) states that the allegations are unfounded.

RELEVANT DOMESTIC LAW

17. The Constitution (*Grunnloven*) includes the following provision:

Article 101§1

"Everyone has the right to form, join or withdraw from associations, including trade unions and political parties."

18. The Human Rights Act of 21 May 1999, No. 30 (*Menneskerettsloven*) contains the following provisions:

Section 1

"The purpose of the Act is to strengthen the status of human rights in Norwegian law.

Section 2

The following conventions shall have the force of Norwegian law insofar as they are binding for Norway:

1. The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 of 11 May 1994 to the Convention, together with the following protocols:

a) Protocol of 20 March 1952,

b) Protocol no. 4 of 16 September 1963 on the protection of certain rights and freedoms other than those already included in the Convention and in the First Protocol to the Convention,

c) Protocol no. 6 of 28 April 1983 on the abolition of the death penalty,

d) Protocol no. 7 of 22 November 1984,

2. The International Covenant of 16 December 1966 on Economic, Social and Cultural Rights,

3. The International Covenant of 16 December 1966 on Civil and Political Rights, together with the following protocols:

a) Optional Protocol of 16 December 1966,

b) Second Optional Protocol of 15 December 1989 on the abolition of the death penalty.

Section 3

The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.”

19. The Working Environment Act of 17 June 2005 No. 62 (*Arbeidsmiljøloven*) contains the following provisions:

Chapter 13. Protection against discrimination

Section 13-1. Prohibition against discrimination

“(1) Direct and indirect discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age is prohibited.

(2) Harassment and instruction to discriminate persons for reasons referred to in the first paragraph are regarded as discrimination.

(3) The provisions of this chapter shall apply correspondingly in the case of discrimination of an employee who works part-time or on a temporary basis.

(...)”

Section 13-2. Scope of this chapter

“(1) The provisions of this chapter shall apply to all aspects of employment, including:

a) advertising of posts, appointment, relocation and promotion,

b) training and other forms of competence development,

c) pay and working conditions,

d) termination of employment.

(2) The provisions of this chapter shall apply correspondingly to the employer's selection and treatment of one-man enterprises and workers hired from temporary-work agencies or other companies

(3) The provisions of this chapter shall apply correspondingly to enrolment and participation in a trade union, employers' organisation or professional organisation. This shall also apply to advantages that such organisations provide to their members.

(4) The provisions of this chapter shall not apply to discrimination owing to membership of a trade union in respect of pay and working conditions in collective pay agreements."

Section 13-4. Obtaining information on appointment of employees

"(1) The employer must not when advertising for new employees or in any other manner request applicants to provide information concerning sexual orientation, their views on political issues or whether they are members of employee organisations. Nor must the employer implement measures in order to obtain such information in any other manner."

20. Basic Agreement LO-NHO - Basic Agreement of 2006 Part A, includes the following provisions:

Chapter I: Parties, application and duration

§ 1-1 Parties

"The Basic Agreement is an agreement between the Confederation of Norwegian Enterprise (NHO) including all its national and local associations and individual enterprises, and the Norwegian Confederation of Trade Unions (LO) including all its unions and associations (divisions). The Basic Agreement in no way affects or alters relations between parties to other collective agreements.

§ 1-2 Scope of Application

The Basic Agreement is the first part of all collective agreements for workers that have been or may be concluded by the organisations named in the heading and/or their members, and which are not covered by other Basic Agreements. Part B of the Basic Agreement applies to industrial and craft enterprises in the same way as the former agreement on production committees. It is the intention that NHO and LO and the interested employer and employee associations may at any time enter into negotiations aimed at making Part B of the Basic Agreement applicable or at adapting the rules in Part B to other commercial sectors than industry and crafts.

§ 1-3 Duration

This agreement, which enters into force on 1 January 2010, shall remain in force until 31 December 2013, and thereafter for a further two years at a time unless terminated by one of the parties in writing with 6 - six - months' notice.

Chapter II: Freedom of Association. Obligation to refrain from industrial action The Right to negotiate and to take legal action

§ 2-1 Freedom of Association

The Confederation of Norwegian Enterprise (NHO) and the Norwegian Confederation of Trade Unions (LO) mutually recognize the freedom of association of employers and employees.

A well-organised working life is a source of strength for the employee and employer organisations and for the community as a whole. By virtue of the broad interests they represent, LO and NHO safeguard the general interests of the whole community.

For LO and NHO to fulfil their roles, it is important that they have wide support. The democratic rights of the associations are laid down in the Basic Agreement and the Act relating to labour disputes. A central principle of national and international law in the field of labour law, is that employees and employers are given the right to form associations and make collective agreements to safeguard their interests.

To ensure organised employees and employers wide support enabling them to fulfil their functions as central actors in society, it is of decisive importance, in negotiation and conflict situations, to show respect for the interests of the organisations and that neither party acts in a manner that will weaken the position of the other.

§ 2–2 Obligation to refrain from industrial action

No stoppages or other industrial action must take place where a collective agreement is in force. If a dispute arises concerning interpretation of a collective agreement, or demands based on a collective agreement, it shall be settled by the Labour Court if the parties fail to reach agreement according to the rules in § 2–3 below.”

21. The Framework Agreement on a fixed Wage System for Dock Workers 2012 - 2014 between the Confederation of Norwegian Enterprise and NHO Logistics and Transport of the one part and the Norwegian Confederation of Trade Unions and Norwegian Transport Workers Union of the other part, contains the following provisions:

(...)

§2 Organization of work

“1. On vessels of 50 DWT or above that sail from a Norwegian port to a foreign port or vice versa, loading and unloading shall be performed by dock workers. An exception is made for all loading and unloading that take place at the enterprise's own facilities, where the enterprise's own staff are in charge of loading and unloading.

Addendum to the protocol:

On a question from the Norwegian Transport Workers' Union (NTF), the representatives of HTL declared that they would not abet violations of provisions pertaining to loading and unloading included in collective agreements with unions affiliated to the ITF.

2. The employer requests the number of men needed for handling of vessels or other work.

Note

The parties agree that Section 2, paragraph 2.1, of the Framework Agreement shall be interpreted as saying that at least one man shall be assigned, irrespective of need.

The workers undertake to perform the work assignments that the administrative body commits to. Achievement of quick and efficient handling shall be sought. At least one man shall be

assigned to each handling operation - cf. protocols of 4, 20 and 21 January 1977. (See enclosure).

3. The assigning party/employer has the right to assign, de-assign and relocate workers during the course of the work process.

4. For work at terminals, work and rest periods will be the same as those applicable at the assigning party's terminal.

5. The parties underscore that in each and every port, the local employers are obligated, as far as practically possible, to assign the permanent dock workers with handling of goods, terminal work, operation of cranes and machinery, and rigging.

In cases when the assigning party needs extra manpower in addition to the party's permanent employees, these will be requested from the administrative body, and on the condition that workers possessing the right skills and efficiency can be provided at the right price.

This does not mean that dock workers are given preferential access to such work. However, the parties will continue their efforts to ensure that such work in the future will be undertaken by a group of dock workers.

6. In their employment of terminal workers and forklift and machine operators, the employers will under otherwise equal conditions give preference to dock workers for such positions.

Mandatory training as a dock worker shall take place in accordance with the addendum to the protocol below.

7. Assignment for work on the next day shall take place no later than at the end of regular working hours. Necessary routines for alerting in this context are to be established locally. Deployment shall be undertaken in such a manner as to achieve an optimally efficient utilization of the workforce.

(...)

§3 Personnel committee/administrative body

In the ports, a personnel committee is to be established, consisting of 3 representatives from each of the parties.

a) The committee shall deliberate and decide on:

Preparation of labour regulations disciplinary matters

Welfare issues

Subdivision of the working hours taking of holiday entitlement

Work clothes within the framework of the collective agreement training

Matters related to the working environment and safety in compliance with applicable legislation if no working environment committee has been established in the port.

b) Deliberate and submit proposals for:

Improvements and/or changes to be undertaken in the port Regulation of the port's workforce.

Hiring of the manager and clerical staff at the administrative body described below wage issues for the manager and clerical staff Matters related to appropriations.

2. In each port an administrative body is to be established, with a board consisting of 2 representatives of the workers and 3 representatives of the employers. This body shall expedite the practical implementation of the decisions made by the personnel committee according to item a) and assess proposals submitted according to item b). The board is in charge of employment and dismissal of dock workers and staff at the body's administration.

The manager is responsible for day-to-day management of the office. He is responsible to the board and participates in the board meetings, but without voting rights.

3. As regards regulation of the port's workforce, the personnel committee shall be provided with statistics showing:

Number of hours worked, loading and unloading (days, nights, weekends)

Hours worked, terminal work

Waiting time

Sickness absence

Hours worked, occasional workers tonnage, cargo volume arriving vessels

If the personnel committee fails to agree on regulation of the workforce, negotiations between the central confederations are to be initiated. If these negotiations fail to reach agreement, the matter is referred back to the administrative body for a final decision."

22. The Collective Agreement for Dock Workers for Southern and Northern Norway 2012-2014 between the Confederation of Norwegian Enterprise, NHO Logistics and Transport and affiliated shipping agents, cargo handlers, ship owners and enterprises to the extent that the abovementioned members of NHO undertake handling or work on their behalf of the one part, and the Norwegian Confederation of Trade Unions and the Norwegian Transport Workers' Union and the dock workers' unions concerned, contains the following provisions:

Applicable everywhere, unless otherwise decided by the Special Collective Agreements.

§1 Organisation of work

1. Present practices are maintained in each location, unless otherwise provided for in specialized collective agreements.

2. Vessels in foreign traffic:

On vessels of 50 DWT or above, sailing from a Norwegian port to a foreign port or vice versa, loading and unloading work shall not be performed by the vessel's crew. Exception is made for all loading and unloading that take place at the enterprise's own facilities, where the

enterprise's own staff are in charge of loading and unloading. Nor does this provision apply to vessels in foreign traffic that as part of a journey also engage in cabotage, since present practices are maintained.

Addendum to the protocol:

On an enquiry from the Norwegian Transport Workers' Union (NTF), the representatives of the Norwegian Logistics and Freight Association (LTL) declared that they would not abet violationsof provisions pertaining to loading and unloading included in collective agreements for unions affiliated to the ITF.

3. The workers undertake to perform the work assignments that the administrative body commits to.

4. The assigning party/employer has the right to assign, de-assign and relocate workers during the course of the work process.

5. Assignment for work on the next day shall take place no later than at the end of regular working hours. Necessary routines for alerting in this context are to be established locally. Deployment shall be undertaken in such a manner as to achieve an optimally efficient utilization of the workforce

6. For work at terminals, work and rest periods will be the same as those applicable at the assigning party's terminal.

7. Off-duty periods:

N.A.F and the chairman of RAF (the ship owners' association) declare that they would advise their members to use off-duty periods for loading and unloading work to the least possible extent in locations where there is an opportunity to obtain regular dock workers, and will help in achieving this.

If the above request for the cooperation of the two employers' associations fails to produce results that are satisfactory for the members of the Norwegian Transport Workers' Union, the NCTU in collaboration with the Norwegian Transport Workers' Union and the Norwegian Seamen's Union upon the expiry of the collective agreements of the latter will seek to enforce the demands of the Norwegian Transport Workers' Union regarding loading and unloading work on board vessels.

RELEVANT INTERNATIONAL MATERIALS

I. Council of Europe

23. The European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 ("the Convention") includes the following provision:

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

24. Relevant judgments of the European Court of Human Rights:

- *Young, James and Webster v. United Kingdom*, Application No. 7601/76, judgment of 13 August 1981;
- *Sigurjónsson v. Iceland*, Application No. 16130/90, judgment of 30 June 1993;
- *Gustafsson v. Sweden*, Application No. 15572/89, judgment of 25 April 1996;
- *Sørensen and Ramussen v. Denmark*, Application Nos. 52562/99 and 52620/99, judgment of 11 January 2006.

II. United Nations

25. The International Covenant on Economic, Social and Cultural Rights of 16 December 1966 includes the following provision:

Article 8

"1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(...)"

26. The International Covenant on Civil and Political Rights of 16 December 1966 includes the following provision:

Article 22

"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(...)"

III. International Labour Organisation (ILO)

27. ILO Convention No. 137 (1973) concerning the Social Repercussions of New Methods of Cargo Handling in Docks of 25 June 1973 contains the following provisions:

Article 1

“1. This Convention applies to persons who are regularly available for work as dockworkers and who depend on their work as such for their main annual income.

2. For the purpose of this Convention the terms *dockworkers* and *dock work* mean persons and activities defined as such by national law or practice. The organisations of employers and workers concerned shall be consulted on or otherwise participate in the establishment and revision of such definitions. Account shall be taken in this connection of new methods of cargo handling and their effect on the various dockworker occupations.

Article 2

1. It shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable.

2. In any case, dockworkers shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned.

Article 3

1. Registers shall be established and maintained for all occupational categories of dockworkers, in a manner to be determined by national law or practice.

2. Registered dockworkers shall have priority of engagement for dock work.

3. Registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice.

(...)

Article 7

The provisions of this Convention shall, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.”

THE LAW

28. Article 5 of the Charter reads as follows:

Article 5 – The right to organise

Part I: “All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.”

Part II: “With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social

interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

A – Arguments of the parties

1. The complainant organisation

29. *Bedriftsforbundet* alleges that in practice a closed shop exists in Norwegian ports. In reality in order to be recruited and to be continued to be employed, dock workers must be member of the NTF in violation of Article 5 of the Charter. Further it is submitted that there is a violation of Article 5 on the grounds that NTF have a monopoly, in that they are given preference by the collective agreements in force.

30. Under ILO Convention No. 137 ratified by Norway in 1974, the Norwegian Government must establish and maintain registers for those who are determined to be dock workers, and must ensure registered dock workers have priority engagement for dock work. In practice this is ensured in Norway by means of collective agreements which cover dock workers – the Southern and Northern Norway Agreement (SNNA) and the Framework Agreement (FA).

31. In all public ports a pool of permanent dock workers has a contractually agreed preferential right to perform loading and unloading work. In the largest ports registration takes place when dockworkers are engaged by a loading/unloading office (Administration office) on a permanent basis. The offices then hire out the dock workers to shipping agents and other port users. Collective agreements require shipping agents bound by such agreements to employ dock workers from the loading and unloading office when ships call at port.

32. In smaller ports registration of dock workers is regulated by the collective agreements, to the effect that local trade union associations of dock workers and local port users shall determine the size of the permanent pool of dock workers. Workers in this permanent pool have a contractually agreed preferential right to perform loading and unloading work.

33. The Ministry of Labour and the Norwegian Labour Authority allow NTF to maintain lists of registered dock workers who are to have preferential rights to employment at Norwegian ports.

34. The Government is obliged to submit to the ILO information/data on the number of dock workers in Norway. *Bedriftsforbundet*, submits copies of the reports submitted from 1976-2007. These reports furnish the number of dock workers members of the NTF, the implication being that all dock workers must be members of

the NTF. This according to *Bedriftsforbundet* proves the existence of a closed shop. Further the first report submitted in 1976 stated that all regular dock workers must be registered at the office and be a member of the worker's organisation.

35. In support of their allegation *Bedriftsforbundet* states that the Oslo dock worker office administrator of the dock workers at the Oslo port (the largest Norwegian port) draws up lists of all the employees liable to pay trade union contributions and pays on behalf of the employees the trade union contributions of those members of NTF. In reality this amounts to all dock workers employed at the port. This is further evidence according to *Bedriftsforbundet* of a closed shop practice.

36. The list drawn up for trade union contributions constitutes the day to day rotation (rota) for the dock workers. Again this implies that union membership is a prerequisite for work at the docks.

37. *Bedriftsforbundet* further refers to a newspaper article in which a vice-president of NTF stated that all registered dock workers subject to the collective agreement applicable are members of NTF. Other union officials from NTF have also stated that a person must be a member of NTF in order to get permanent employment at the ports.

38. Also in support of the complaint, *Bedriftsforbundet* submits evidence from the NHO, which is the employer party to the collective agreement applicable to dock workers. NHO maintains that in order to be a permanent dock worker persons must be members of NTF. Evidence is also submitted from the Managing Director of the Ships and Terminal Operators Association who states that in order to be hired as a dock worker in Oslo harbour a person must be a member of NTF. All permanent workers in Oslo port are members of the NTF. The dock workers office in Oslo organises the work of all dock workers, according to a list organised by NTF. Any dock worker who leaves the NTF will be placed at the bottom of the list and will be given the poorest paying work.

39. NHO Logistics and Transport also maintains that NTF membership is a requirement for employment as dock workers at ports.

40. In response to the Government's evidence that a worker (Mr J. Eriksson) works in a Norwegian port and has never been a member of NTF, *Bedriftsforbundet* submits that according to the harbour master at the port, the individual concerned has never been employed by the office/administration body and has worked as a substitute crane operator, a position not encompassed by the Framework Agreement (FA).

41. Reference is made to a District Court judgement where the judge referred to information provided by the NTF that all loading and unloading personnel are members of NTF and that permanent employment is dependent on such membership (Jaren District Court 26/95A, judgment of 4 February 1995).

42. *Bedriftsforbundet* submits observations of the European Commission and EFTA Surveillance Authority in case E-14/15 *Norges Høyesterett*, a request for an advisory opinion from the Supreme Court of Norway brought before the EFTA Court in a dispute between *Holship Norge AS* and *Norsk Transportarbeiderforbund*. In the opinion of the European Commission “it is a restriction on the freedom of establishment pursuant to Article 31 of the EEA agreement for a trade union to use a boycott in order to produce acceptance of a priority rule laid down in a collective agreement by a company whose parent company is based in another EEA State, when the collective agreement entails that the company must give preference to buying loading and unloading services from a separate entity having the characteristics (...) rather than use its own employees for this work” (Observations of the EU Commission in case E-14/15, 29 July 2015). *Bedriftsforbundet* cites these observations in support of their argument that NTF have a trade union monopoly in Norwegian ports.

2. The respondent Government

43. The Government points out that Article 101§1 of the Constitution guarantees freedom of association in both its positive and negative aspect. In addition freedom of association is protected by the Human Right Act of 21 May 1999, No. 30 which incorporates certain international human rights conventions into domestic law, for example the European Convention on Human Rights and the UN Covenants. Both the previous Working Environment Act and the current Working Environment Act (17 June 2005, No. 62) as interpreted by the Courts, also protect negative freedom of association.

44. The Government also states that freedom of association including the right not to associate has been recognised as a fundamental principle of labour law by the Norwegian social partners for more than one hundred years. It refers in this respect to successive Basic Agreements between NHO and the Norwegian Confederation of Trade Unions (LO). It further refers to judgments of the Supreme Court, which clearly uphold the right not to organise, for example *Norsk Folkehjelp* (Rt. 2001 p.1413) *Norsk Sjømannsforbund* (Rt. 2008 p. 1601).

45. The Government describes the main collective agreements covering dock work in Norway, the SNNA and the FA. It also mentions that there are a few collective agreements limited to individual ports. It highlights that the FA provides for the establishment of an administrative body in each port covered by the collective agreement consisting of two representatives of workers and three representatives of employers, this board is in charge, *inter alia*, of employment and dismissal of dock workers.

46. The SNNA does not contain specific provisions on the administration of ports and employment of dock workers, however the Labour Court has noted that the system of administration is the same under this agreement.

47. Section 2 of the FA and Section 3 of the SNNA implement the principle of preferential treatment of dock workers laid down in Article 3 of ILO Convention No. 137. The Norwegian authorities have for many years reported to the ILO on measures implementing Convention No. 137. The first report in 1976 (relied upon by *Bedriftsforbundet*) erroneously indicated that dock workers were all organised workers. Subsequent reports clarified the situation.

48. The Government, further in response to the allegation that closed shop practices exist in Norwegian ports and are tacitly acknowledged by the Government, firstly refers to domestic law guaranteeing freedom of association and encompassing the negative right of freedom of association (see above paragraph 43). It states therefore that it has fulfilled its obligations under Article 5 of the Charter. The above mentioned provisions of the Working Environment Act, which protect the negative right of freedom of association, are enforced by the Equality and Non-Discrimination Ombudsman, and further individuals who believe that they have been discriminated on the grounds of membership or non membership of a trade union may bring claims before the national courts.

49. The Government points out that the relevant collective agreements do not contain closed shop clauses.

50. The Government submits that it has taken all the necessary measures to comply with Article 5 of the Charter and has not allowed or acknowledged closed shops in Norwegian ports. The legal order is clear that closed shops are prohibited.

51. As to whether closed shop practices exist in practice as alleged, the Government states that there is no evidence in this respect. It firstly maintains that it would be unlikely that the LO through its affiliate the NTF would flout national law, fundamental principles of labour law, common practice of the social partners and a fundamental provision in the Basic Agreement. It would also be surprising, if this were the case, that the NHO would accept this.

52. Further the complaint, according to the Government, disregards the system of joint administration at the ports: as the administration boards are comprised of three employer representatives and two employee representatives, employers are in a dominant position and would be unlikely to require dock workers to be members of NTF.

53. The Government states that the complaint relies on media statements by members of the NTF alleging membership of the union is required of dock workers. However, according to the Government, these statements are in fact simply generalising the fact many dock workers are members of the NTF.

54. The Government has contacted the main Federations NHO and LO for their views on the substance of the complaint. The LO denied the claim of closed shop practices and stated that the complaint was “based on erroneous and undocumented submissions that there is a practice at Norwegian ports requiring dock workers to be

affiliated with a union....”. The NHO however did state that it was aware that members of the NTF had made statements to the effect that union membership is a requirement for dock workers with preferential rights. The Government states that this answer implies that the NHO itself had direct knowledge of closed shop practices, but in any event NHO could not provide any evidence corroborating this.

55. The Government highlights that there is a lack of evidence documenting that an applicant for dock work with preferential rights has been rejected (or subsequently let go) on the grounds that he/she is not a member of NTF, justifying the assertion of a longstanding and consistent closed shop practice. No cases of individual complaints before the Equality and Non-Discrimination Ombudsman or before the courts have been cited.

56. The Government provides evidence of a non-unionised dock worker (Mr J. Eriksson) from a media report which also cites the local union chairman who confirms that, although there is a high degree of unionisation among dock workers, membership of the NTF is not required.

57. As regards the argument that closed shop practices have been acknowledged by a report to the ILO under ILO Convention No. 137, the Government states that it is based on a misunderstanding. The Labour Authority does not maintain a register of dock workers, but relies on the figures supplied by the parties to the collective agreements and the NTF in order to fulfil ILO reporting obligations. But this procedure does not amount to an acknowledgement that membership of NTF is a condition for employment as a dock worker.

58. The Government in support of its argument that no closed shop practices exist at Norwegian ports refers to a Court of Appeal judgment of 8 September 2014 (*Borgarting lagmannsrett*, 14-076577ASD-BORG/02). In the judgment the Court held that Norwegian law guarantees freedom of association including the negative right. It found no evidence that there was a closed shop practice in the port of Drammen. It referred to the fact that both parties to the case were aware that such practices were unlawful, and that employer representatives were in the majority on the Board of the Administration body. Further it referred to testimony from dock workers who had not been members of the NTF when recruited.

59. The Government disputes that the opinion of the EU Commission and EFTA Surveillance Authority following a request for an advisory opinion by the Norwegian Supreme Court to the EFTA Court in a dispute between *Holship Norge AS* and *Norsk Transportarbeiderforbund* (case E-14/15 *Norges Høyesterett*) is relevant to the present complaint. It argues that the case does not deal with the issue of freedom of association but EEA rules on freedom of competition and establishment.

B. Observations by the European Trade Union Confederation (“the ETUC”)

60. The ETUC provides information on the situation in Norway: legal and factual background, including the role of ILO Convention No. 137 and its application in Norway, relevant collective agreements, the reasons for the adoption of the system in

place, etc. It states that the number of regular dock workers in Norway has decreased substantially, from approximately 3,000 in 1974 to fewer than 500 today.

61. The ETUC disputes *Bedriftsforbundet's* claim that in reality a closed shop exists in this sector. It maintains that there is no correlation between the total number of dock workers and the number of NTF members. It cites figures from 2004 where there were 492 dock workers and 402 members of NTF and 2012 where the respective figures were 420 and 350. In order to meet the demand for dock workers, recourse is had to temporary workers who are hired as required, and these workers tend not to be unionised.

62. Dock workers are registered in Norway in two ways: a loading and unloading office is established and the above office employs a group of loading and unloading workers. Those workers who are permanently employed at the loading and unloading office are deemed to be registered dock workers with priority rights to employment. The FA is used as the collective bargaining agreement in these ports. In small ports, where there is no basis for establishing a loading and unloading office, the local parties determine the size of a fixed group of loading and unloading workers. Those workers that belong to the fixed group have priority rights.

63. Priority loading and unloading cargo from ships is currently established in the FA and SNNA in the following terms:

- "the loading and unloading work shall be carried out by loading and unloading workers" (§ 2(1) FA) and

- "the loading and unloading work shall not be carried out by the crew on the vessel" (§ 1(2)SNNA).

64. Shipping companies have to hire registered dock workers from a pool of workers in the port (registered workers). Consequently, a company bound by either the FA or the SNNA is not permitted to use own workers or others like members of crews in the vessels to perform stevedore services. However, if registered dock workers do not utilize their priority right (e.g. because of lack of capacity) the company is permitted to use other workers.

65. According to the ETUC, as a result of the European Court of Human Rights' and other international legal bodies' ban on closed shop clauses the Norwegian Supreme Court has held such clauses and practices to be unlawful, see for example the *Norsk Folkehjelp* judgment (see above) and *Norsk Retstidende* (Rt. 1997, p. 334).

66. The LO in a Secretariat meeting between LO's management and LO union members in early 2002 adopted the following resolution:

"The closed shop clauses should be removed from all employment contracts".

67. This resolution created certainty within the unions with regard to these issues.

68. Nothing in any of the collective agreements require registered dock workers to be members of NTF or any other trade union.

69. The ETUC maintains that the present complaint has come about as certain of the member enterprises of NHO and *Bedriftsforbundet* dislike the terms of the FA and therefore allege the practice in Norwegian ports amounts to closed shop practices. There are ongoing disputes at three ports in Norway over collective agreements and the complaint should be seen against this backdrop.

70. ETUC maintains some of the evidence submitted by *Bedriftsforbundet*, in particular public statements by individuals, has been taken out of context or does not accurately represent the current reality and therefore cannot be relied upon.

71. It further states that it is not true as *Bedriftsforbundet* alleges that NTF registers dock workers. When seeking to fulfil its obligations under ILO Convention No. 137 the Labour Authority simply requests the NTF to provide information on numbers of registered dock workers members of NTF. The particular reason for this request is the Government's (as well as the social partners') view that this Convention is implemented by collective agreements (and not by legislation). NTF as one party to the relevant collective agreement can and indeed does provide the information it collects for its own trade union purposes, in particular "those loading and unloading workers who are members of NTF and workers at the loading or unloading offices".

72. The ETUC also contests that the fact that the Oslo Dock workers' office pay trade union contributions to the NTF is evidence of a closed shop practice. It states that this is in fact normal practice in Norway, since the same system involving the deduction of union dues from wages is established by collective agreements to which all the major employers' organisations have adhered.

73. The ETUC denies that there is a trade union monopoly, it provides evidence of another trade union, Confederation of Vocational Unions, that has established itself in a certain port and concluded a collective agreement.

74. The ETUC recalls that the Committee has previously found the situation in conformity with Article 5 of the Charter under the reporting system; in particular in Conclusions 2006 and 2010.

75. The ETUC highlights that the complainant organisation has been unable to produce one single example of a dock worker being presented with a demand that they must be unionised to the NTF in order to get a job as dock workers or having been threatened with dismissal if they were employed but not members of the NTF. Nor does the number of NTF members in relation to the total number of dock workers indicate the existence of a closed shop practice, quite the opposite.

C – Assessment of the Committee

76. The Committee firstly recalls that under Article 5 no worker may be forced to join or remain a member of a trade union. Any form of compulsory trade unionism, statutory or otherwise, is incompatible with Article 5 (Conclusions III (1973), Statement of Interpretation) and would strike at the very substance of the right to freedom of association. The freedom guaranteed by Article 5 implies that the exercise of a worker's right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom (*Confederation of Swedish Enterprise v. Sweden*, Complaint No. 12/2002, decision on the merits of 15 May 2003, §29). To secure this freedom, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all union security clauses (Conclusions VIII (1984), Statement of Interpretation on Article 5). It follows that clauses in collective agreements or legally authorised arrangements whereby jobs are reserved in practice for members of a specific trade union are in breach of the freedom guaranteed by Article 5 (Conclusions XIX-3 (2010), Iceland).

77. The Committee notes that Norwegian law protects the negative freedom of association, the right not to join. It notes in this respect the Constitution, and the Human Rights Act of 21 May 1999, No. 30 which incorporates the European Convention on Human Rights. Discrimination on grounds of membership of a trade union in all aspects of employment is prohibited by the Working Environment Act of 17 June 2005, No. 62.

78. Furthermore, there is consistent and clear case law emanating from the Norwegian superior courts which protect the right not to join a trade union: see *Norsk Retstidende* (Rt. 1997, p. 334), *Norsk Folkehjelp* (Rt. 2001 p. 1413), *Norsk Sjømannsforbund* (Rt. 2008, p. 1601).

79. The Basic Agreement between NHO and LO guarantees freedom of association (Section 2-1) and the commentary to the agreement states that Section 2-1 affirms the positive as well as the negative freedom of association.

80. The Committee also notes that the relevant collective agreements covering dock workers, providing for the registration of dock workers with priority rights, contain no provisions requiring registered dock workers to be members of the NTF or any other trade union.

81. On this basis the Committee finds that Norwegian law provides an adequate framework for the implementation of Article 5.

82. The Committee considers that the question to be resolved is then whether a closed shop arrangement exists in practice; i.e. whether there is a *de facto* requirement to be a member of the NTF.

83. *Bedriftsforbundet* in support of its allegation relies on the fact that, when reporting to the ILO, the Government uses NTF data, as well as media statements and reports of senior NTF members, NHO Logistics and Transport and the Managing Director of the Ships and Terminal Operators Association in Oslo.

84. The Government denies the above and further refers to the system of joint administration of ports as an additional safeguard.

85. The Committee considers the fact that the Norwegian authorities maintain no official register of dock workers and supply figures provided by the NTF to the ILO to be of little consequence. The Government does not maintain a central register of dock workers for practical reasons and this is not in itself an indication that dock workers are compelled to be union members.

86. As regards the actual figures, the Committee notes the data on the number of registered dock workers and their union membership submitted by *Bedriftsforbundet*, but finds it insufficient to establish conclusively that there exists a closed shop.

87. Likewise, it finds the evidence from individual trade union officials and others submitted by both parties to the complaint not to be conclusive.

88. The Committee notes that no case of an individual worker complaining to the Ombudsman or before the Courts, of being forced to join or remain in a trade union, has been cited. It recalls in particular the importance of the role of the Ombudsman in affording individuals remedies in discrimination cases and finds the lack of cases before this institution to be significant.

89. It further notes that the Court of Appeal found in *Holship Norge AS v. Norsk Transportarbeiderforbund* no evidence of a closed shop practice at the port of Drammen (judgment of 8 September 2014, *Borgarting lagmannsrett* 14-076577ASD-BORG/02).

90. The Committee finds that the evidence at its disposal is not sufficient to prove the existence of a closed shop in practice. There is no conclusive evidence that dock workers are compelled to be members of the NTF.

CONCLUSION

For these reasons, the Committee concludes:

Unanimously that there is no violation of Article 5 of the Charter.



Lauri LEPPIK
Rapporteur



Giuseppe PALMISANO
President



Régis BRILLAT
Executive Secretary